OCBC BANK (MALAYSIA) BHD v. NZ BINA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AZIZAH NAWAWI JCA
HASHIM HAMZAH JCA
[CIVIL APPEAL NO: J-02(IM)(NCvC)-1544-07-2018]
14 JULY 2022

Abstract – *Where the parties to the deed of assignment have used the word 'absolutely', the deed is meant to be an absolute assignment. When a deed of assignment is an absolute assignment, the parties and the court are bound by those words and effect must be accorded to the contractual rights.*

CONTRACT: *Assignment – Absolute assignment – Deed of assignment of contract proceeds executed in favour of bank – Whether deed to assign absolutely all contract proceeds from main contract – Whether deed of assignment of contract proceeds extinguished and of no effect – Whether there was any obligation to continue to assign any contract proceeds to bank – Amount that was absolutely assigned*

CIVIL PROCEDURE: *Disposal on point of law – Appeal against – Absolute assignment – Deed of assignment of contract proceeds executed in favour of bank to assign absolutely all contract proceeds from main contract – Whether deed of assignment of contract proceeds extinguished and of no effect – Whether there was any obligation to continue to assign any contract proceeds to bank – Rules of Court 2012, O. 14A*

This was an appeal by OCBC Bank (Malaysia) Bhd ('bank'), against the decision of the High Court Judge ('HCJ') in allowing NZ Bina Sdn Bhd's ('NZ Bina') application under O. 14A of the Rules of Court 2012 ('O. 14A application'). By a letter of award, Jabatan Kerja Raya ('JKR') had awarded a project ('Puralek project') for the sum of RM229,978,889.70 to NZ Bina. NZ Bina then subcontracted the Puralek project to Reaplite Industry Sdn Bhd ('Reaplite'). NZ Bina and Reaplite jointly approached the bank to grant banking facilities to Reaplite to carry out the Puralek project. The bank offered credit facilities to Reaplite for the sum of RM66,499,000, or approximately 29% of the subcontract award of RM223,079,523. NZ Bina then executed a master security agreement ('MSA'). NZ Bina also executed a deed of assignment of contract proceeds in favour of the bank, to assign absolutely all contract proceeds from the main JKR contract for the Pularek project to one designated collection account ('DCA account') held by NZ Bina with the bank. To affect the DOA of the contract proceeds, NZ Bina obtained the letter of consent to assign from JKR. NZ Bina however

terminated the subcontract with Reaplite allegedly because Reaplite failed to complete the contract works within the prescribed period. NZ Bina also terminated the DOA. The bank responded by highlighting that there was a charge in its favour pursuant to the MSA. NZ Bina commenced this suit against Reaplite and the bank in the High Court. NZ Bina filed the O. 14A application and posed two questions: (i) whether with the payment of the sum of RM223,079,523 or in excess thereof by JKR into NZ Bina's accounts with the bank, NZ Bina's DOA of the contract proceeds was extinguished and was of no effect ('question 1'); and (ii) by the notice of termination from NZ Bina to Reaplite and the bank respectively, whether NZ Bina had any obligation to continue to assign any contract proceeds from JKR to the bank ('question 2'). The HCJ answered question 1 in the affirmative and question 2 in the negative. Hence, this appeal. The issues that arose were (i) whether the DOA was an absolute assignment; (ii) the amount that was absolutely assigned under the DOA; and (iii) whether the appeal had become academic.

Held (allowing appeal)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) Where the parties to a DOA have used the word 'absolutely', the deed is meant to be an absolute assignment. From cl. 2 of the DOA, the word 'mutlak', which means 'absolute', clearly showed that the assignment concerned was an absolute assignment given by NZ Bina to the bank, of which such assignment covered all monies (inclusive of interest) present or hereinafter payable by JKR to NZ Bina under the main contract. Hence, the DOA was an absolute assignment of all monies under the JKR main contract. As such, since the DOA was an absolute assignment, the parties or the court were bound by those words and can look no further. Effect must be given to the contractual rights. The HCJ erred in her finding that the DOA was not an absolute assignment. (paras 38 & 39)

(2) Even if a sum in excess of RM223 million had been paid by JKR to NZ Bina's DCA account with the bank, the DOA could not be extinguished and be of no effect. Question 1 must be answered in the negative that the DOA was not extinguished by the payment of RM223 million into NZ Bina's DCA account with the bank. The DCA was only extinguished when all monies under the JKR contract had been paid into NZ Bina's DCA account with the bank. (paras 57 & 58)

(3) The subject matter of the appeal was whether the decision of the HCJ to revoke the DOA was a correct decision and this was certainly a live issue for this court to decide. Added to that, the bank also submitted that NZ Bina could not submit that this appeal had been rendered academic as they had objected to the bank's stay application on the basis that the appeal would not be rendered nugatory if stay was not allowed. (para 62)

(4) The court made the following consequential orders: (i) the DOA was revived; (ii) within 30 days, NZ Bina was to furnish to the bank complete details of all sums paid by JKR to it from the date the DOA was cancelled by the High Court up to the date of the Court of Appeal's decision; (iii) within 30 days, NZ Bina was to pay into the DCA account the sums in para. (ii) above; and (iv) all monies stated above was frozen until the disposal of the action in the High Court or until further orders. (para 4)

Case(s) referred to:

Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***

Kerajaan Negeri Kelantan v. Petroliam Nasional Berhad & Other Appeals [2014] 7 CLJ 597 FC ***(refd)***

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd [2020] 4 CLJ 811 FC ***(refd)***

Tenaga Nasional Bhd v. Tan Sooi Lek & Ors [2022] 6 CLJ 177 FC ***(refd)***

UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Rules of Court 2012, O. 14A

For the appellant - Clarence Edwin, R Paramanandan & S Humah Devi; M/s Clarence Edwin Law Offices

For the 1st respondent - Muralee Menon & Tan Wei Ting; M/s Jaffar & Menon

For the 2nd respondent - Eugene Jayaraj, David Soosay & Prathib Patmanabon; M/s Kandiah Partnership

[Editor's note: Appeal from High Court, Johor Bharu; Civil Suit No: JA-22NCvC-275-12-2017 (overruled).]

Reported by Lina E

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal by OCBC Bank (Malaysia) Berhad ("bank"), the second defendant in the High Court against the decision of the High Court Judge whereby the learned judge has allowed the O. 14A of the Rules of Court 2012 ("ROC 2012") application filed by the plaintiff, NZ Bina Sdn Bhd ("NZ Bina").

[2] NZ Bina has posed two questions in the application:

(i) Whether by the payment of the sum of RM223,079,523 or in excess thereof by JKR into NZ Bina's account with the bank, NZ Bina's deed of assignment (of contract proceeds) dated 3 June 2014 is extinguished and of no effect? (Q1)

(ii) By the notice of termination dated 30 October 2017, from NZ Bina to Reaplite Industry Sdn Bhd ("Reaplite") and the bank respectively, whether NZ Bina has any obligation to continue to assign any contract proceeds from JKR to the bank? (Q2)

[3] The learned judge had answered the first question (Q1) in the affirmative and the second question (Q2) in the negative. However, in the grounds of judgment ("GOJ"), the learned judge had maintained the affirmative answer to the first question (Q1) but declined to answer the second (Q2).

[4] Having considered the appeal records and the submissions of the parties, we have allowed the bank's appeal and set aside the decision of the learned judge. At the same time, apart from dismissing NZ Bina's claim against the bank, we have also made the following consequential orders:

(i) The deed of assignment dated 3 June 2014 is revived;

(ii) Within 30 days, NZ Bina is to furnish to the bank complete details of all sums paid by JKR to it from the date the deed of assignment was cancelled by the High Court up to the date of the Court of Appeal decision;

(iii) Within 30 days, NZ Bina is to pay into the DCA account the sums in para. (ii) above; and

(iv) All monies stated above is frozen until the disposal of the action in the High Court or until further orders.

The Salient Facts

[5] By a letter of award dated 18 December 2013, Jabatan Kerja Raya ("JKR") had awarded a project known as 'Membina Jalan Baru 4 Lorong 2 hala dari FT 092 ke Pularek Kota Tinggi (Reka dan Bina)' ("Pularek Project") for the sum of RM229,978,889.70 to NZ Bina.

[6] By a letter of award dated 31 December 2013, NZ Bina then sub-contract the Pularek Project to the Reaplite, the second defendant, for the sum of RM223,079,523 (a difference of about RM6,000,000 from the JKR contract).

[7] NZ Bina and Reaplite jointly approached the bank to grant banking facilities to Reaplite to carry out the Pularek Project as a subcontractor. NZ Bina and Reaplite had produced the main contract dated 18 December 2013 between NZ Bina and JKR as well as the subcontract dated 31 December 2013 between NZ Bina and Reaplite for the purpose of the banking facilities.

[8] By a letter of offer dated 7 March 2014, OCBC offered credit facilities to Reaplite for the sum of RM66,499,000 or approximately 29% of the sub contract award of RM223,079,523. The credit facilities included as follows:

(i) Letter of guarantee for a performance bond of RM11,499,000;

(ii) Letter of guarantee for advance payment bond of RM10,000,000;

(iii) Overdraft 2 (checking) of RM3,000,000;

(iv) Overdraft 3 (non-checking) of RM2,000,000; and

(v) Local bill purchased (with sub-limit of RM5,000,000 for invoice financing) of RM40,000,000.

[9] Pursuant to the credit facilities granted by OCBC and as security for the aforesaid banking facilities, NZ Bina executed a Master Security Agreement dated 16 June 2014 ("MSA"). NZ Bina's Board of Directors had passed a resolution dated 8 March 2014 to authorise NZ Bina to execute the Master Security Agreement.

[10] NZ Bina had also executed a deed of assignment of contract proceeds dated 3 June 2014 in favour of OCBC. The said deed of assignment ("DOA") was executed to assign absolutely all contract proceeds from the main JKR contract for the Pularek Project to one Designated Collection Account ("DCA account") held by the NZ Bina with the bank.

[11] To affect the deed of assignment of contract proceeds, NZ Bina had obtained the letter of consent to assign from JKR.

[12] Before JKR disbursed the payments under the main contract, JKR would deduct the retention sum, advance payment and any other charges (to other parties), if any.

(i) after the said deductions, the gross payments received from JKR will be deposited into NZ Bina's designated DCA account No: 710-127156-2, which is controlled by the bank under the terms of the security arrangement;

(ii) the bank will then pay a sum equivalent to 3% of the sum received towards the management fees of NZ Bina into NZ Bina's account (No: 710-127107-4);

(iii) thereafter, the balance 97% of the gross payment would be transferred to Reaplite's DCA, which is controlled by the bank under the terms of the security arrangement;

(iv) the bank would then deduct the sum payable under banking facilities; and

(v) the balance of the payment will be paid into Reaplite's current account for the work done under the sub-contract.

[13] NZ Bina purportedly terminated the sub-contract with Reaplite by a letter dated 30 October 2017 allegedly because Reaplite had failed to complete the contract works within the prescribed period. This was seriously disputed by Reaplite and had counterclaimed against NZ Bina for a declaration that the termination is void and/or unlawful. Basically, the termination of the sub-contract is being challenged and the validity of its termination has yet to be determined by the court.

[14] NZ Bina had also sent a letter dated 30 October 2017 to the bank to purportedly terminate the deed of assignment dated 3 June 2014. In the letter, NZ Bina stated that the basis for the purported termination was:

(i) that NZ Bina never requested the bank for banking facilities;

(ii) that Reaplite had defaulted in the completion of the subcontract; and

(iii) That NZ Bina had terminated Reaplite's appointment as the sub-contractor.

[15] The bank sent a letter dated 30 November 2017 in response and in this letter the bank highlighted that there was a charge in its favour pursuant to the Master Security Agreement dated 16 June 2014 executed by NZ Bina.

[16] NZ Bina commenced this suit against both Reaplite (first defendant) and the bank (second defendant) in the High Court. As against Reaplite, NZ Bina sought liquidated damages and other monetary sums.

[17] As against the bank, NZ Bina sought the following reliefs:

(i) a declaration that OCBC did not provide any banking facilities to NZ Bina and the DOA dated 3 June 2014 has been validly terminated by the NZ Bina on 30 October 2017;

(ii) a declaration that OCBC no longer has any rights over the DOA dated 3 June 2014 which was provided by NZ Bina;

(iii) that OCBC revokes the DOA dated 3 June 2014 and return the same to NZ Bina within seven days from the date of the order being granted; and

(iv) that OCBC revokes the Government's Letter of Consent to the Deed of Assignment of Contract No. JKR/IP/CKUB/01/2014 and return the original document to NZ Bina within seven days from the date of the order being granted.

[18] On 2 April 2018, NZ Bina filed the O. 14A of the ROC 2012 application. NZ Bina had posed two questions of law with regard to the O. 14A application, which NZ Bina contended will allow its claim against the bank to be conclusively determined without the need for a trial. The questions are as follows:

(i) Whether with the payment of the sum RM223,079,523 or in excess thereof by JKR into NZ Bina's account with the bank, NZ Bina's deed of assignment (of contract proceeds) dated 3 June 2014 is extinguished and of no effect?

(ii) By the notice of termination dated 30 October 2017 from NZ Bina to Reaplite and the bank respectively, whether NZ Bina has any obligation to continue to assign any contract proceeds from JKR to the bank.

[19] The learned judge had answered Q1 in the affirmative and Q2 in the negative respectively. Hence the bank has filed this appeal before this court.

Decision Of The High Court

[20] The learned judge has allowed NZ Bina's O. 14A of the ROC 2012 application on the basis that as between NZ Bina and the bank, the core issue is on the interpretation of the DOA dated 3 June 2014. The learned judge has agreed with NZ Bina that its claim against the bank can be conclusively determined on the interpretation of the relevant documents without the need for a full trial.

[21] The learned judge then allowed the O. 14A application, answered question 1 in the affirmative but did not answer question 2 in the GOJ. The learned judge made consequential orders to terminate the DOA dated 3 June 2014, declared that the bank no longer has any rights under the DOA and the bank is to revoke the DOA and the consent from JKR and return these documents to NZ Bina.

Our Decision

[22] NZ Bina's application is premised on O. 14A of the ROC 2012, and it reads as follows:

> **Determination of questions of law or construction (O. 14A, r. 1)**
>
> 1(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) On such determination the Court may dismiss the cause or matter or just make such order or judgment as it thinks just.

[23] Learned counsel for NZ Bina has relied on the followings cases which are the *locus classicus* for an O. 14A of the ROC 2012 application:

(i) The Federal Court in *Kerajaan Negeri Kelantan v. Petroliam Nasional Berhad & Other Appeals* [2014] 7 CLJ 597 at pp. 620 and 621 from paras. 27 to 29 *inter alia* held:

> [27] We are in agreement with the submission of learned counsel and Senior Federal Counsel for Petronas and second defendant respectively that the decisions of the Federal Court on the application of O. 14A in the three cases cited above do not in any way depart or steer away from the decision in the Terengganu case. In our view, the Court of Appeal in the Terengganu case did not attempt to lay down a hard and fast rule on the application of O. 14A. The decision in the Terengganu case merely stated some of the relevant factors which should be considered in dealing with an application under O. 14A and they are not meant to be exhaustive. This view had already been expressed by Richard Malanjum, CJSS in *Bato Bagi* which says:
>
> > With respect, I do not think the Court of Appeal in *Petroleum Nasional Bhd* (*supra*) laid down a hard and fast rule for courts to comply with when confronted with applications under O. 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive ...
>
> [28] We share the same view as expressed in *Bato Bagi* above and we are unable to understand how the decision in that case can be said to have steered away from the decision of the Court of Appeal in the *Terengganu* case, as argued by counsel for the plaintiff.
>
> [29] Meanwhile, *Dream Property* concerns the issue of the determination of delivery of vacant possession and the confirmation thereof pursuant to the special condition of a sale and purchase agreement entered into between the parties. In *Thein Hong Teck*, among the critical disputes were the issues of dissolution of a partnership before the filing of a petition for winding up and the preservation of rights of the partnership in respect of legal actions commenced before the dissolution of the partnership (as a result of the Federal Court order in one of the many suits filed in connection with the partnership). The issues in these two cases, as viewed by the Federal Court, were questions of facts which were seriously disputed between the parties and required to be determined in a full trial, to which the application of O. 14A was held unsuitable in the circumstances of those cases. In addition, it is also to be noted that in *Dream Property*, there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. *By the above decisions, it is clear that the position of the law in an O. 14A application is that where there are serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an O.14A procedure. In contrast, the Court of Appeal in the Terengganu case, after having carefully scrutinized the pleadings, concluded that the issues*

raised were purely legal issues based on the construction of documents which are suitable to be determined by the O. 14A procedure. In our considered view, the facts and circumstances in the three cases above and in the Terengganu case must be distinguished. The decisions of the Federal Court in those three cases did not change or set up any new proposition of law on the application of O. 14A laid down in Terengganu case and therefore, we answer the first question posed in the affirmative. (emphasis added)

(ii) In *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273, the Federal Court held at para. 38:

[38] We begin by briefly discussing the mode of action, which alludes to *O. 14A of the Rules. This Order enables the High Court to determine any question of law or construction of documents arising in any cause or matter at any stage of the proceedings, where to the court such questions are suitable for determination without going through a full trial, and that determination will dispose of the entire matter.* In order to do that it is crucial that all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted. In a gist there are no substantial factual disputes left to be resolved. In the Malaysian High Court Practice 2001 Desk Edition at para. 14A.1.3 the writers authored:

> The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted. This postulates that there is no dispute or no further dispute exists as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.

[39] From the submission and evidence before us, we are satisfied that the factual issues are way past behind us, with the remaining dispute centring on the construction of a provision of the Act, 1996 Regulations and the interpretation to be given to the contractual documents, namely the letter of award, the EPCC contract and the consortium agreement. (emphasis added)

[24] Based on the above decisions by the Federal Court, O. 14A of the ROC 2012 procedure may be applied where the issues raised were purely legal issues based on the construction of documents, upon which the material facts relating to the subject matter of the question have been duly proved or admitted.

[25] In the present appeal, the learned judge has agreed with the submissions of learned counsel for NZ Bina that this is a suitable case to be disposed under O. 14A of the ROC 2012, where the court can determine the question of law raised between NZ Bina and the bank without a full trial of the action.

[26] Before this court, learned counsel for NZ Bina has reiterated the same position and submitted as follows in paras. 8.5 to 8.8 of their written submission:

(iii) Are there any disputed facts between the Plaintiff and 2nd Defendant?

a) Pleading - No dispute

8.5 A perusal of the Amended Statement of Claim and OCBC's Amended Statement of Defence (SOD) (pages 115 to 139 J-1 RA) would reveal the following:

a) OCBC does not dispute the granting of banking facilities to RISS (Para 4.1 SOD)

b) In paras. 4.2, 4.3 and 4.4 SOD, OCBC pleaded that the following documents were produced to them to support the application for banking facilities:

i) letter dated 18.02.2013 from JKR to the Plaintiff accepting the Plaintiff's tender.

ii) letter of award dated 31.12.2013 from the Plaintiff to RISB.

iii) letter of offer dated 07.03.2014 from OCBC to RISS.

iv) board of director's resolution by the Plaintiff dated 08.03.2014.

v) Master Security Agreement dated 16.06.2014.

vi) Plaintiff's Deed of Assignment of Contract proceeds with JKR's consent dated 03.06.2014.

vii) that the letter of award dated 18.12.2013 and 31.12.2013 be stamped with the words 'This contract is financed by OCBC Bank (Malaysia) Berhad'.

8.6 OCBC then in para 4.5 (page 121 J-1 RA) demonstrated through a diagram on how the contracts proceeds paid by JKR will be utilised by OCBC. This is not disputed by the Plaintiff.

8.7 **None of the above documents or facts are in dispute.** Thus the High court was moved to determine whether based on the above documents the obligations of the Plaintiff to OCBC extinguished when payments totalling RM223,079,523.00 being the sub contract sum in accordance with the letter of award dated 31.12.2013 to RISB was made to OCBC.

8.8 We reiterate that this question is suitable for summary disposal and in fact was made out. (emphasis added)

[27] In the present appeal, the appellant bank has also conceded that question 1 is purely a legal issue based on the construction of documents. As such, we are of the considered opinion and we agree with the learned judge that question 1 posed by NZ Bina is purely a legal issue based on the construction of documents. We agree with the learned judge's finding that the question posed "can dispose of the claim between plaintiff and defendant 2 it will dispose of a substantial matter leaving only plaintiff's claim against defendant 1". (see para. 8 of the GOJ)

Question 1

[28] Question 1 is on the interpretation of the DOA. We are of the considered opinion that this appeal can be disposed off by determining whether or not there is a valid and an absolute assignment of the proceeds of the main JKR contract from NZ Bina to the bank under sub-s. 4(3) of the Civil Law Act 1956 ("CLA"). A valid assignment would transfer absolutely the rights of NZ Bina over the contract proceeds to the bank.

Whether The DOA Is An Absolute Assignment

[29] In *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379, the Federal Court has laid out the conditions for effecting an absolute legal assignment under s. 4(3) of the CLA. They are:

(i) that the assignment must be in writing under the hand of the assignor;

(ii) that the assignment must be absolute and not by way of charge only; and

(iii) that expressed notice in writing must have been given to the person the assignor under the assigned chose in action.

[30] In *UMW Industries* (*supra*), the Federal Court also held that if the assignment fulfils all the above conditions, it will transfer absolutely the chose in action and the right to sue upon it in the assignee's own name. Being absolute, it "purports to pass the entire interest of the assignor in the chose in action."

[31] In order to ascertain whether the assignment is absolute or not, the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 held as follows:

> In our judgment and it seems clear from the authorities abovementioned, **whether or not an assignment is an absolute one** (not purporting to be by way of charge only) **within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.** (emphasis added)

[32] In the same case, (*Nouvau Mont Dor, supra*) George Seah FJ states as follows.

A Looking at the whole document of 18 February 1978 and bearing in mind the provision of s. 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. *The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all*
B *the rights title and interest in the Sale Agreement dated 1 April 1977 and the remedies of enforcing them.* The instrument clearly purported and was intended in point of form, to *be an absolute assignment because of the use of the word "absolutely" in Clause 1 thereof* (see Fry LJ in *Comfort v. Betts* (*supra*) at p. 740). If the assignment was an absolute one (not purporting to be by way of
C charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment (*Hughes v. Pump House Hotel Co.* (*supra*) and *Comfort v. Betts* (*supra*). We therefore agree with the judgment of the
D learned Judicial Commissioner but for different reason, that the appellant was not competent to maintain this action at the time when the originating summons was filed on 17 November 1982. (emphasis added)

[33] The case of in *Nouvau Mont Dor* (*supra*) was followed by the Supreme Court in *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, where the court held at p. 44
E (CLJ); pp. 150 to 151 (MLJ):

> We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank*'s case but with a deed of assignment. We would therefore reiterate what this Court has said in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985]
> F CLJ 231 (Rep) (*supra*) "that whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself;". Now whatever the parties might have as laymen stated in their correspondence between themselves, they had
> G elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a. that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn. Bhd. of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all
> H reasonable steps to obtain a subsidiary title to it and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of ringgit one million to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:
>
> > I In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document we agreed with the conclusion of the learned Judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. *The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement.* A document given "by way of charge" is not one which absolutely transfers the property. As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of Counsel that an equitable charge was made in this case. The appeal of the defendant was therefore dismissed with costs.

48. *The words employed in the instrument are plain and clear.* The 1st respondent was assigning absolutely to the Bank all monies under the JKR Contract. (emphasis added)

[34] The above principle had been reaffirmed by the Federal Court in *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1, where the court held that:

[24] Whether or not an assignment is an *absolute one not purporting to be by way of charge or security only is to be gathered only from the four corners of the instrument itself and all the terms of the instrument must be considered* (see *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268). (emphasis added)

[35] In *Damai Freight* (*supra*) the Federal Court explained the legal effect of an absolute assignment as follows:

[25] In the present case, the assignment document is the LACA, in which clause 7(1) therein states that the appellant, as the Borrower, "*absolutely assigns* to the bank the lease of the said Land and the full and entire benefit of the Principal Agreement together with the rights, title and interest of the Borrower therein". In this regard, the *use of the words "absolutely assigns" in the provision of the LACA clearly demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of a charge only* (see *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, SC) … (emphasis added)

[36] In *Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd* [2020] 4 CLJ 811, the Federal Court held as follows:

[66] Whether or not an assignment is absolute for the purposes of the statutory regime is ultimately an issue of construction. (see *Mercantile Bank of London Ltd v. Evans* [1899] 2 QB 613).

[67] The case of *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, SC is authority for the proposition that *the use of the words "absolutely assigns" demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of charge only.*

A [68] *The bank here holds an absolute assignment, consistent with the use of the words "assigns absolutely" as employed in section 3.1 of the contract for the assignment of proceeds* (see also *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* (*supra*); *United General Insurance Co Sdn Bhd v. Progress Credit Sdn Bhd* [1988] 1 LNS 8; *Chung Khiaw Bank Ltd v. Hipparion (M) Sdn Bhd* [1988] 1 CLJ 164; [1988] 1 CLJ (Rep) 480; *Phileoallied Bank (Malaysia) Bhd* B *v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 AMR 2081 FC).

[69] It is apparent from the *use of the words "assigns absolutely"* in the clauses specified in the contract for the assignment of proceeds in the instant case, *that the assignment of the chose in action, ie, the right to the proceeds paid into the* C *project accounts, is an absolute assignment and not by way of charge only.*

[70] *In other words the legal entitlement to the contract proceeds, as and when they are deposited in the project accounts* (*albeit* the first or second project account) *is that of the bank* and not Swakaya or any other third party. The effect and consequence of the absolute assignment is therefore that ownership or D entitlement to recover and receive the proceeds paid in by SESB was transferred from Swakaya to the bank as early as 3 April 2013.

[71] It is evident from the statute itself that the effect of an assignment of a 'chose in action' (*ie*, the monies paid by SESB to Swakaya under the SESB Contract for the supply of diesel oil from Swakaya to the bank), is to pass and transfer the legal right to that chose in action to the bank, E as assignee, from the date of notice being accorded to the obligator, *ie*, SESB. This means that as of 3 April 2013, the bank enjoyed legal title to the monies in the project account. That is the effect of the absolute assignment (see also *Affin Bank Berhad v. ACP Industries Berhad* [2013] 1 LNS 388; [2014] 1 MLRA 182). (emphasis added)

F **[37]** Therefore, the apex court has held in several cases as cited above that where the parties to the deed of assignment have used the word 'absolutely', the deed is meant to be an absolute assignment. In the present appeal, the cl. 2 of the DOA reads as follows:

2. Penyerahan Hak

G

Sebagaimana balasan kepada pihak Bank yang menurut budi bicara mutlaknya memberi pendahuluan kepada Penyerah Hak dari semasa ke semasa sejumlah wang tertentu yang jumlahnya tidak melebihi Wang Pokok sebanyak Ringgit Malaysia Enam Puluh Enam Juta Empat Ratus Sembilan Puluh Sembilan Ribu Sahaja H (RM66,499,000.00). *Penyerah Hak dengan mutlaknya menyerahkan kepada Bank tersebut semua wang, termasuk faedah dan hak, yang kini atau selepas ini adalah genap masa atau kena dibayar kepada Penyerah Hak oleh wakil berkuasa Kerajaan di bawah Kontrak* itu tertakluk kepada kewajipan pihak Penyerah Hak yang terkandung dalam Kontrak itu. (emphasis added)

I

[38] From cl. 2 of the DOA, the word "mutlak", which means 'absolute' clearly shows that the assignment concerned is an absolute assignment given by the NZ Bina to the bank, of which such assignment covers all monies (inclusive of interest) present or hereinafter payable by JKR to NZ Bina under the main contract. We are of the considered opinion that the DOA was an absolute assignment of all monies under the JKR main contract.

[39] As such, since the DOA is an absolute assignment, the parties or the court are bound by those words and can look no further. Effect must be given to the contractual rights as enshrined in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513 at pp. 640-641 (CLJ); p. 530 (MLJ), where the Federal Court held that in the case of 'absolute assignment':

> All things considered, we were more inclined to agree with learned counsel for the appellant, in particular with his submission that *in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.* (emphasis added)

[40] Therefore, we find that the learned judge has erred in her finding that the DOA was not an absolute assignment.

The Amount That Was Absolutely Assigned Under The DOA

[41] The next issue is to ascertain the amount that was absolutely assigned under the DOA. The learned judge concluded that the DOA had been extinguished because JKR had paid in excess of RM248 million to NZ Bina. In this connection, the learned judge held:

> ... based on clause (b) and (c) of the Letter of Consent from JKR the payment made by JKR to Plaintiff as at 30-4-2017 was RM248,820,199.54 ... **By looking at the documents as referred to in its totality Plaintiff only assigned the sum of RM223 million** which by the deeming provisions of the Letter of Consent from JKR has been paid. Defendant 2 is deemed to have received a sum in excess of RM248 million. It follows that the contractual obligation of Plaintiff under the DOA has been fulfilled. (emphasis added)

[42] We are of the considered opinion and we agree with the bank that there is nothing in the DOA or the MSA that could give rise to such a conclusion. The DOA and MSA are the contracts which NZ Bina had executed as security for the contract financing the bank gave to Reaplite.

[43] We find that it is evident from cl. 2 of the DOA that NZ Bina had absolutely assigned (dengan mutlak menyerahkan) all monies (semua wang termasuk faedah dan hak, yang kini atau selepas ini) which are now due or in future due and payable by JKR under the main contract. Therefore, there is nothing in the DOA which fixed the amount that had been assigned absolutely.

[44] This position is supported by the MSA. Clause 2.1 of the MSA reads as follows:

> *In consideration of the Bank at the request of the Obligor, having granted and made available* and/or agreeing to grant and make available and/or continuing to grant and make available the Facilities or granting any time or indulgence in such manner, to such extent and for so long as the Bank may at its absolute discretion deem fit *to the Borrower, the Obligor hereby covenants with the Bank to duly and punctually pay to the Bank and discharge on demand the Indebtedness Provided Always the liability of the Obligor under this Clause shall be limited to an amount equivalent to the sum total of the Receivables.*
> (emphasis added)

[45] Under the MSA, the obligor is NZ Bina and the borrower is Reaplite. Pursuant to the MSA, NZ Bina covenanted to pay to the bank Reaplite's indebtedness to the bank but NZ Bina's liability to the bank was limited "to an amount equivalent to the sum total of the receivables".

[46] In cl. 1.1, "Receivables" is defined as:

> **Receivables means all moneys** (whether Assignable Receivables or Non-Assignable Receivables) **payable now or in the future to or for the account of the Obligor arising out of or as a result of under or in connection with all or any of the following Contracts** which are or may at any time or from time to time hereafter (i) be identified by the Bank in the Letters; and/or (ii) submitted to and accepted by the Bank for the purpose of this Agreement; and (iii) which are assigned or charged to the Bank pursuant to the provisions of Clause 3 of this Agreement: ...
> (emphasis added)

[47] "Assignable receivables" is defined in cl. 1.1 as "the receivables payable under the relevant contracts which are assignable to the bank by the obligor by giving notice in writing to the debtor or upon obtaining the written consent of the debtor"'. It is evident that the "assignable receivables" in the present case refers to the receivables due to NZ Bina under the main contract with JKR, which NZ Bina had assigned absolutely to the bank with JKR's consent.

[48] This is in line with the NZ Bina's Board of Directors ("BOD") resolution dated 8 March 2014 which states as follows:

> **That in consideration of ... the Bank agreeing to grant the credit facilities of RM66,499,000.00 ... to the Borrower ... upon the terms and conditions of the Letter of Offer dated 7th March 2014** as may be varied or supplemented on such other terms and conditions as the Borrower and the Bank may mutually agree ... **approval is hereby given for the Company to furnish the following security(ies) in favour of the Bank to secure the repayment by the Borrower of the Facilities ...**

For Master Security Agreement

(a) **assign and charge all its rights title and interest in and to the Receivables and Goods (as defined therein) to the Bank pursuant to the Master Security Agreement;**

(b) to charge the Designated Collections Account ("DCA") (as defined therein) to the Bank pursuant to the terms and conditions of the Master Security Agreement; ... (emphasis added)

[49] Added to that, the letter of offer dated 7 March 2014 referred to in NZ Bina's BOD's board resolution defines "contract" as:

the **contract known as** "Membina Jalan Baru 4 Lorong 2 Hala dari FT 092 ke Pularek Kota Tinggi Johor (Reka dan Bina)" (Contract) **amounting to RM229,978,889.70 awarded by Jabatan Kerja Raya (JKR or the Awarder) to NZ Bina Sdn Bhd (NZ Bina),** herein called the Contract. (emphasis added)

[50] The letter of offer also states that the drawdown of the facility is subject, among others, to the completion of the following legal documentation:

NZ Bina Sdn Bhd shall deliver a letter in the form and substance acceptable to the Bank to *notify JKR on its assignment of proceeds to the Bank and to irrevocably instruct and authorize JKR to remit all the Contract proceeds directly to the NZ Bina Sdn Bhd's DCA maintained with OCBC Bank. This letter is to be duly acknowledged by the JKR and consented via issuance of Government Assent to the Deed of Assignment*. (emphasis added)

[51] Thus, it is clear from reading the MSA, NZ Bina's BOD resolution and the letter of offer that under the MSA, NZ Bina had agreed to assign to the bank all monies payable to NZ Bina under the JKR contract.

[52] In the circumstances, we agree with the bank that the learned judge has erred in her finding that NZ Bina "only assigned the sum of RM223 million". This finding is wholly unsupported by the clear terms of the DOA and the MSA.

[53] The learned judge has also failed to consider that the contract financing facility is still subsisting. The bank is still liable to JKR under a performance bond (RM11 million) given pursuant to the contract financing facility. Until and unless the performance bond expires, NZ Bina under the terms of the MSA was obliged to continue furnishing security. This is clearly stated in cl. 3.4 of the MSA which reads:

The security created pursuant to Clause 3 herein *is expressly intended to be and shall be continuing security for the repayment and payment of the Indebtedness notwithstanding that the Borrower and/or the Obligor may at any time or times cease to be indebted* to the Bank for any period or periods ... (emphasis added)

[54] The aforesaid clause makes it clear that even if there is no money owing by Reaplite to the bank from time to time, the MSA shall still continue in force to secure the indebtedness. This is because "indebtedness" is defined to include "all liabilities and obligations whether present or future or actual or contingent for the repayment and payment of all monies by the borrower and the security parties in respect of or arising from the facilities and the security documents".

[55] The performance bond is a contingent liability. Reaplite does not owe this money to the bank. But if JKR makes a call on the performance bond, the bank must make payment on it and the sum paid to JKR would then be a debt owed by Reaplite to the bank. NZ Bina had agreed to furnish security in respect of Reaplite's debt to the bank under the facility including such contingent debts, the performance bond.

[56] It is not in dispute that from the fresh evidence adduced, the performance bond is still subsisting. The letter dated 18 February 2019 issued to NZ Bina's solicitors established this fact. In this letter, the solicitors stated:

> *2. OCBC telah mengeluarkan Jaminan Bank untuk Bon Perlaksaan pada 12.08.2014 yang tak boleh batal diatas balasan Kontrak No. JKR/IP/CKUB/ 01/2014 yang diawadkan oleh Kerajaan Malaysia kepada NZ Bina Sdn. Bhd.*
>
> 3. ... OCBC telah melanjutkan Jaminan Bank untuk Bon Pelaksanaan melalui surat bertarikh 23.11.2015 (perlanjutan kepada 13.05.2020) dan 04.10.2016 (perlanjutan kepada 02.08.2020). *Jaminan Bank ini masih sah, wujud dan boleh dikuatkuasakan.*
>
> 4. Kami merujuk kepada surat OCBC bertarikh 07.11.2018 yang ditujukan kepada pihak Tuan. Surat ini hanya menyatakan bahawa Jaminan Bank dikeluarkan di atas permintaan Reaplite Industry Sdn Bhd. Surat bertarikh 07.11.2018 ini tidak ada sebarang kesan keatas Jaminan Bank bertarikh 12.08.2014 yang masih berkuatkuasa.
>
> 5. Kami ingin mengetahui diatas asas apakah pihak Tuan menyatakan Jaminan Bank bagi Bon Perlaksanaan telahpun ditamatkan oleh OCBC padahal *ianya merupakan jaminan yang tak boleh batal.* (emphasis added)

[57] It follows that even if a sum in excess of RM223 million has been paid by JKR to NZ Bina DCA account with the bank, the DOA regardless cannot be extinguished and be of no effect.

[58] In the premise, we are of the considered opinion that question 1 must be answered in the negative, that the DOA is not extinguished by the payment of RM223 million into NZ Bina's DCA account with the bank. The DOA is only extinguished when all monies under the JKR contract has been paid into NZ Bina's DCA account with the bank.

Question 2

[59] With regard to question 2, NZ Bina had abandoned question 2 and therefore question 2 must go for trial.

Whether The Appeal Has Become Academic

[60] It is also the submission of learned counsel for NZ Bina that this appeal has been rendered academic. NZ Bina has submitted that the substratum of the appeal is the DOA and a letter of consent to the assignment of contract dated 3 June 2014 issued by JKR to OCBC. The order dated 1 July 2018 *inter alia* required the cancellation of the DOA and letter of consent both dated 3 June 2014 by OCBC and the return of the same to NZ Bina. Since the letter dated 16 August 2018 issued by OCBC had cancelled both the DOA and letter of consent, therefore the substratum of the appeal has been destroyed and the appeal is rendered academic.

[61] The test to ascertain if an issue has been rendered academic has been decided by the Federal Court in *Tenaga Nasional Bhd v. Tan Sooi Lek & Ors* [2022] 6 CLJ 177, where the court said as follows:

> [41] As a general rule, an issue may be academic when the issue does not require answer or adjudication by court because it is not necessary to the case. In such circumstances the question would be rendered hypothetical or moot as there is no live issue for the court to determine.

[62] In the present appeal, the subject matter of the appeal is whether the decision of the learned judge to revoke the DOA is a correct decision, and this is certainly a live issue for this court to decide. Added to that, learned counsel for the bank also submitted that NZ Bina cannot submit that this appeal has been rendered academic as they had objected to the bank's stay application on the basis that the appeal will not be rendered nugatory if stay is not allowed.

Conclusion

[63] Based on the reasons enumerated above, we find that there are merits in this appeal that warrant our appellate intervention. We, therefore, allowed the appeal and set aside the orders of the learned judge with costs. We have also issued consequential orders as in para. [4] above.